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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 138

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

HALL C. SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 18, 1952.
CERTIORARI GRANTED OCTOBER 13, 1952

14 COMMISSIONER OF INTERNAL REVENUE VS. HALL C. SMITH

tion of the deficiency herein respondent erred in the manner and form as alleged in paragraph 4 of the petition.

(a) Denies the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

(c) Admits the allegations contained in subparagraph (c) of paragraph 5 of the petition.

(d) Admits the allegations contained in subparagraph (d) of paragraph 5 of the petition, but denies that said salaries were reasonable.

(e) Admits that petitioner acquired all the capital stock of the Charles E. Smith and Sons Company in the amount of \$30,000 in 1951; that on October 15, 1942, petitioner acquired all of an additional issue of stock of said company in the amount of \$30,000; and that said petitioner held said stock in the amount of \$60,000 until January 7, 1943, when he sold \$30,000 of it to said company. Denies the remaining allegations contained in subparagraph (e) of paragraph 5 of the petition.

(f) Admits that the Commissioner of Internal Revenue in reviewing the income tax returns of the Charles E. Smith and Sons Company for the taxable years 1942 and 1943 determined that a reasonable allowance for salary (paid petitioner) to be deducted by said company was \$25,000 for 1942 and \$30,000 for 1943; that the amount of \$57,265.08 of a total of \$87,265.08 salary paid by said company to petitioner together with the \$30,000 paid by the company to petitioner in redemption of its stock (par. 5 (e) *supra*) rendered said company insolvent and therefore rendered petitioner liable as transferee to the extent thereof for the deficiencies in tax and penalty determined by the Commissioner to be due and owing from said company for the taxable years 1942 and 1943; and that said determinations were sustained by this Court. Denies the remaining allegations contained in subparagraph (f) of paragraph 5 of the petition.

(g) Admits that petitioner reported as income the salaries received from The Charles E. Smith and Sons Company in the amounts of \$52,000.00 for 1942 and \$87,265.08 for 1943. Denies the remaining allegations contained in subparagraph (g) of paragraph 5 of the petition.

(h) Denies the allegations contained in subparagraph (h) of paragraph 5 of the petition.

(i) Admits that in the year 1941 petitioner paid \$30,000 for 300 shares of the stock of said Charles E. Smith and Sons Company and in the year 1942 paid \$30,000 for an additional 300 shares of stock in said Charles E. Smith and Sons Company; that on January 7, 1943, petitioner returned the 300 shares of said stock to said corporation in exchange for \$30,000. Denies the re-

maining allegations contained in subparagraph (i) of paragraph 5 of the petition.

21 (j) Denies the allegations contained in subparagraph (j) of paragraph 5 of the petition.

6. Answering the amendment to the petition respondent admits that same is a true copy of a claim filed by petitioner with the Collector of Internal Revenue for the 1st District of Ohio.

7. Denies generally each and every allegation contained in the petition and the amendment to ~~petition~~ not hereinabove specifically admitted, qualified, or denied.

WHEREFORE, it is prayed that the petition be denied and that respondent's determination be in all respects approved.

CHARLES OLIPHANT (wwk),
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

DEWITT M. EVANS,
Division Counsel.

JOHN O. DURKAN,
Special Attorney,
Bureau of Internal Revenue.

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Exhibit 1 to answer to petition

COPY

September 4, 1947
Filing District
First Ohio

CinD: SN: DAR mec

Mr. Hall C. Smith,

R. R. No. 4, Batavia, Ohio

DEAR MR. SMITH: You are advised that the determination of your income tax liability for the taxable year ended December 31, 1943, discloses a deficiency of \$422.20, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to ~~file~~ a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent-in-Charge, Cincinnati, Ohio, for the attention of CinD:

COMMISSIONER OF INTERNAL REVENUE VS. HALL C. SMITH

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1 In The Tax Court of the United States

Docket No. 15836

HALL C. SMITH, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances

For Petitioner: Sol Goodman, Esq. For Respondent: J. O. Durkan, Esq.; R. C. Whitley, Esq.

1947

Docket Entries

- Sept. 15—Petition received and filed. Taxpayer notified. Fee paid.
Sept. 16—Copy of petition served on General Counsel.
Sept. 17—Motion to consolidate with dockets 9461, 9462 and 184-R filed by taxpayer.
Sept. 19—Notice of Hearing 10-8-47 on petitioner's motion—Washington, D. C.
Sept. 22—Amendment to petition filed by taxpayer. 9-23-47 copy served.
Oct. 8—Hearing had before Judge Turner on motion of petitioner to consolidate or to stay proceeding in dockets 9461 and 9462 to strike 184-R from the calendar of 10-27-47 at Cincinnati, Ohio. All said motions denied. Motion of petitioner to strike 184-R from the calendar of Oct. 27, 1947 at Cincinnati, Ohio filed at hearing—10-10-47 copy served.

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- Oct. 8—Order that motion to consolidate is denied and motion to defer entry of decision dockets 9461 and 9462 is denied and motion to strike docket 184-R from trial calendar of 10-27-47 is denied entered.
Oct. 14—Answer to petition and amendment to petition filed by General Counsel.
Oct. 14—Request for hearing at Cincinnati, Ohio, filed by General Counsel.
Oct. 21—Notice issued placing proceeding on Cincinnati calendar. Service of answer and request made.
Nov. 28—Reply to answer filed by taxpayer—copy served.
Nov. 28—Motion to advance cause for early hearing filed by taxpayer. 12-4-47 granted.

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1948

- Jan. 14—Hearing set 3-1-48 at Cincinnati, Ohio.
Mar. 1—Hearing had before Judge LeMire on merits.
Stipulation of facts filed. Briefs due 3-31-48
replies 4-15-48.
Mar. 13—Transcript of hearing 3-1-48 filed.
Mar. 31—Brief filed by General Counsel.
Apr. 12—Motion for leave to file brief out of time filed by taxpayer.
Apr. 12—Order that the brief is withdrawn in docket 9461; that the Clerk shall remove first and fourth pages of brief and shall substitute new pages furnished by counsel bearing caption of the proceeding at docket 15836 and further ordered that petitioner's motion at docket 15836 is granted and aforesaid brief with pages substituted as directed shall be filed in docket 15836, entered.
Apr. 12—Brief filed by taxpayer. 4-13-48 copy served.
Aug. 16—Opinion rendered LeMire, J. Decision will be entered under Rule 50.
Aug. 24—Computation for entry of decision filed by taxpayer.
8-30-48 served.
Aug. 27—Hearing set Sept. 22, 1948 on petitioner's computation.
8-30-48 copy served.

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- Sept. 8—Computation for entry of decision filed by General Counsel.
Sept. 15—Ordered continued to Sept. 29, 1948 at Washington,
D. C. on settlement under Rule 50, entered.
Sept. 29—Hearing had before Judge LeMire on settlement under
Rule 50. C. A. V. Memorandum briefs Oct. 18, 1948.
Oct. 5—Transcript of hearing of 9-29-48 filed.
Oct. 21—Brief re computation filed by taxpayer. 10-27-48
copy served.
Oct. 26—Decision entered LeMire, J., Div. 14.

1949

- Jan. 19—Petition for review by U. S. Court of Appeals for the
Circuit filed by General Counsel.
Jan. 25—Notice of filing petition for review sent to Sol Goodman,
attorney for taxpayer, filed.
Feb. 1—Proof of service of petition for review filed.
(Taxpayer)
Feb. 1—Proof of service of petition for review filed.
(Counsel)
Feb. 18—Motion for extension to April 19, 1949 to prepare and
transmit record filed by General Counsel.

- Feb. 18—Order enlarging time to April 19, 1949 to prepare and transmit record entered.
- Apr. 13—Certified copy of an order from 6th Circuit extending time to June 19, 1949 to file record on review filed.
- June 27—Certified copy of an order from 6th Circuit extending time to August 19, 1949 to file record on review filed.
- Aug. 4—Statement of points with proof of service thereon filed by General Counsel.
- Aug. 4—Designation of contents of record with proof of service thereon filed by General Counsel.

In the Tax Court of the United States

Petition, filed September 15, 1947

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing Bureau symbols Cin.D:SN:DAR, dated September 4th, 1947, and, as a basis of his proceeding, alleges as follows:

1. The petitioner is an individual with residence at R. R. No. 4, Batavia, Ohio. The tax return here involved was filed with the Collector of Internal Revenue for the Southern District of Ohio.

2. The notice of deficiency (a copy of which is hereto attached and marked Exhibit "A") was mailed to the petitioner on September 4th, 1947. There is also attached hereto and marked Exhibit "B", a copy of the report of the agent dated August 15th, 1947.

3. The taxes in controversy are income taxes for the calendar year 1943, in the amount of \$422.20, and for the year 1944, no change, and the disallowance of a claim for refund of \$46,864.00, all of said amounts being in dispute.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors, to-wit: There is no deficiency due and, on the contrary, there has been an overpayment in income taxes for the years 1942, 1943 and 1944, in the amount of \$59,488.25.

5. The facts upon which the petitioner relies as a basis of this proceeding are, as follows:

(a) The deficiency set up is based upon the disallowance of the payment of real estate taxes which were due and payable after petitioner acquired the real estate and are proper deductions for the year 1943.

(b) The facts upon which the petitioner relies as a basis for this proceeding, as to his claim for refund heretofore filed, in the amount of \$46,864.00, and a redetermination of the tax liability entitling him to a credit or refund for said years of a total amount of \$59,488.25, are as follows:

4. COMMISSIONER OF INTERNAL REVENUE VS. HALL C. SMITH

(c) Petitioner states that the Charles E. Smith and Sons Company is a corporation organized under the laws of the State of Ohio in the year 1904, with an office and place of business in Cincinnati, Ohio; that, during the taxable fiscal years of said corporation, ending July 31, 1942 and 1943, he was then the president of said corporation and owner of all of its capital stock.

(d) Petitioner states that, in the year 1941, said corporation fixed petitioner's salary at \$52,000.00 per annum for the fiscal year ending July 31, 1942, and for the fiscal year ending July 31, 1943, said corporation fixed petitioner's salary at 15% of its sales but no less than \$52,000.00 per annum, which salary in said year amounted to \$87,265.08.

(e) Petitioner states that, during the taxable years 1942 and 1943, he had invested in said corporation the sum of \$30,000.00 in its capital stock and that about the month of September, 1942, he was paid on account of his salary the sum of \$30,000.00, which amount he immediately paid back to the corporation and took 300 shares of its stock for an additional \$30,000.00, thus making petitioner's investment in said corporation amount to \$60,000.00; that, in January, 1943, petitioner returned said 300 shares of stock to said corporation in exchange for \$30,000.00.

(f) Petitioner states that the Commissioner of Internal Revenue, in reviewing the income tax returns of said corporation, made a determination that, for the fiscal year 1942, the reasonable salary to be paid to petitioner was \$25,000.00; that for the fiscal year 1943, the reasonable salary to be paid to petitioner was the sum of \$30,000.00; and determined that petitioner received excessive salary in the amount of \$27,000.00 for the fiscal year 1942 and \$57,265.08 for the fiscal year 1943, and by reason thereof assessed additional taxes against said corporation in the amount of \$110,909.92 for the fiscal year 1943 and \$7,980.95 for the fiscal year 1942. Petitioner states that by reason of said additional assessments, it was then determined that said corporation was insolvent, as of July 31, 1943, having liabilities of \$207,912.63 as against assets of \$173,525.24, and by reason thereof, petitioner was held liable as transferee and there has been asserted against petitioner a transferee liability in the amount of \$87,265.06.

(g) Petitioner states that when he received said salaries for the year 1942, he reported said \$52,000.00 as income and there was determined a tax due thereon in the amount of \$23,884.81. Petitioner further states that for the year 1943, he reported said \$87,265.08 as income and there was determined a tax due thereon in the amount of \$33,517.05; that by reason of the forgiveness feature of the income tax law applicable to the years 1942 and 1943, instead of paying the total of said two amounts, petitioner's

total tax for the year 1943, including a portion of the amount of tax for which he was liable for the year 1942, amounted to \$59,488.25.

(h) Petitioner states that by reason of the claims of the respondent and the decision of the Tax Court of the United States, in cause No. 9461 and Cause No. 9462, it has been determined that the amount of salary actually receivable by the petitioner was \$25,000.00 for the year 1942 and \$30,000.00 for the year 1943, and that any excess amount petitioner is required to return to the account of said corporation to apply for the payment of its taxes. Petitioner states that by reason of said determination and decision and the requirement and petitioner return said excessive salary, the correct amount of tax due from petitioner for said years should be reduced and by reason thereof petitioner's total liability for tax was \$12,624.25 for said two years, and there is due petitioner a refund of \$46,864.00.

(i) Petitioner states that, in the year 1941, he paid \$30,000.00 for 300 shares of the stock of said Charles E. Smith and Sons Company and, in the year 1942, he paid \$30,000.00 for an additional 300 shares of stock in said Charles E. Smith and Sons Company; that on January 7, 1943, he returned the 300 shares of said stock to said corporation in exchange for \$30,000.00. This Court, in Cause No. 9461 and Cause No. 9462, having found that the receipt by petitioner of said \$30,000.00 for said stock made petitioner liable as transferee for Charles E. Smith and Sons Company. By reason of said facts, the payments of salary of \$25,000.00 for the year 1942 and \$30,000.00 for the year 1943, which salaries respondent determined reasonable, were not as a matter of fact received by petitioner as reported by petitioner in his income tax return but, in fact, constituted a return of his capital investment in said corporation and was not subject to income tax.

(j) Petitioner therefore claims that the total amount of tax of \$59,488.25 which he paid for the years 1942 and 1943 was improperly paid and that the total amount of said tax should be refunded to him, and that when the petitioner filed his claim for refund at said time, said respondent had only asserted a transferee liability on the portion of excessive salaries paid petitioner by the corporation and since then this Court having found that petitioner is also liable on the disbursement in exchange for stock, petitioner therefore received no income from said corporation for said years and is entitled to a refund of said amount of \$59,488.25.

Wherefore, petitioner prays that this Court may hear the proceedings and redetermine the amount of tax due from petitioner and make an award ordering the respondent to make a refund

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8 to the petitioner of the amount of \$59,488.25, and for any
and all other relief that is proper in such cases.

SOL GOODMAN,
1016 Union Trust Building, Cincinnati, Ohio,
Attorney for Petitioner.

Duly sworn to by Hall C. Smith jurat omitted in printing.

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Exhibit A to petition

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Cincinnati 1, Ohio

In reply refer to CinD:SN:DAR meec.

Mr. HALL C. SMITH,
R. R. No. 4, Batavia, Ohio.

DEAR MR. SMITH: You are advised that the determination of your income tax liability for the taxable year ended December 31, 1943, discloses a deficiency of \$422.20, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Cincinnati, Ohio, for the attention of CinD:SN:DAR. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEORGE J. SCHOENEMAN,
Commissioner,
By (S) H. D. EVANS,
Internal Revenue Agent in Charge.

Enclosures:

Statement

Waiver Form 870

COMMISSIONER OF INTERNAL REVENUE VS. HALL C. SMITH

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STATEMENT

Mr. HALL C. SMITH, R.R. No. 4, Batavia, Ohio.

INCOME TAX LIABILITY FOR THE TAXABLE YEAR ENDED
DECEMBER 31, 1943Year
1943Deficiency
\$422.20

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated July 30, 1947, and to your claim for refund for the year 1943, filed January 15, 1947.

If a petition to the Tax Court of the United States is filed against the deficiency proposed herein, the issue set forth in your claim for refund should be made a part of the petition to be considered by the Tax Court in any redetermination of your tax liability. If a petition is not filed, the claim for refund will be disallowed and official notice will be issued by registered mail in accordance with section 3772 of the Internal Revenue Code.

11 ADJUSTMENTS TO INCOME TAX NET INCOME

Year ended December 31, 1943

Income tax net income disclosed by return	\$84,207.90
Unallowable deductions and additional income:	
(a) Taxes on rental property	499.66
Income tax net income adjusted	84,707.56

EXPLANATION OF ADJUSTMENTS TO INCOME TAX NET INCOME

(a) It is held that real estate taxes on your rental property in the amount of \$499.66, which had accrued prior to the date of purchase of such property, does not constitute an allowable deduction in accordance with the provisions of section 23 of the Internal Revenue Code.

ADJUSTMENT TO VICTORY TAX NET INCOME

Year ended December 31, 1943

Victory tax net income disclosed by return	\$84,456.95
Unallowable deductions and additional income:	
(a) Taxes on rental property	499.66
Total	84,956.61
Nontaxable income and additional deductions:	
(b) Intangible Tax	150.00
Victory tax net income adjusted	84,806.61

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EXPLANATION OF ADJUSTMENTS TO VICTORY TAX NET INCOME

- (a) The real estate taxes accrued prior to the purchase of your rental property do not constitute an allowable deduction, as explained hereinbefore.
- (b) It is held that you are entitled to an additional deduction of \$150.00 for intangible tax on your property, in accordance with the provisions of section 451 (a) of the Internal Revenue Code.

NOTE.—As to page 4—See page 4 of Exhibit "B."

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Exhibit B to petition

In re: Hall C. Smith, R. R. No. 4, Batavia, Ohio.

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**Examining Officer
Wm. Carenok, Jr.**

**Date of Report
July 30, 1947**

INDEX

**Pages: 5
Schedules: 4**

PRELIMINARY STATEMENT

SUMMARY

Years	Deficiency
1943	\$422.20 and disallowance of claim for refund.
1944	No change.

Additional tax: \$422.20.

Principal cause of the deficiency: Disallowance of real estate taxes paid in 1943 upon property purchased in 1943.
The findings were discussed with taxpayer and Mr. Sol Goodman, attorney.

Other necessary information:

Claim for refund No.

Year involved.

1943

----- 1-15-47

Date of Claim.

\$46,864.00

Amount of claim.

0

Amount of claim allowed.

\$46,864.00

Amount of claim disallowed.

Taxpayer claims that amount of salary received from Charles E. Smith & Sons Co., 1942—\$52,000.00; 1943—\$87,265.08 considered excessive and only the amount allowed as deduction to corporation by Tax Court, 1942—\$25,000.00; 1943—\$30,000.00 should be considered his income for taxable years involved.

13 The claim is disallowed in full because taxpayer had full use of salary received by him in each year.

COMMISSIONER OF INTERNAL REVENUE VS. HALL C. SMITH

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SCHEDULE No. 1

Year ended 12-31-42

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.		\$48,608.42
As corrected		48,608.42
Net adjustment as computed below		No Change

SCHEDULE No. 2

Year ended 12-31-43

ADJUSTMENTS TO NET INCOME

	Income tax net income	Victory tax net income
Net income as disclosed by return.	\$84,207.90	\$84,456.95
As corrected	84,707.56	84,806.61
Net adjustment as computed below	499.66	349.66
Unallowable deductions and additional income:		
(a) Rents		
Total	499.66	499.66
Nontaxable income and additional income:		
(b) Taxes		
Total	0	150.00
Net adjustment as above	0	150.00
	499.66	349.66

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SCHEDULE No. 2-A

Year ended 12-31-43

EXPLANATION OF ITEMS

(a) Rents (income tax and victory tax):

Reported	\$1,808.72
Corrected	2,308.38
Difference	499.66

Taxpayer purchased two pieces of real estate as follows:

- I—2786 Observatory Avenue; deal closed 3-26-43.
- II—3237 Griest Avenue; deal closed 3-16-43.

In Ohio real estate taxes accrue on the day preceding the second Monday in April; though assessment is not made until December.

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The person who owns the property on the date the taxes accrue under State Law is entitled to the deduction (if he pays the tax).

During 1943 taxpayer paid following 1942 taxes which had previously accrued on the property—a lien at time of purchase.

I—\$190. 14

II—\$309. 52

499. 66

Both of these items are not allowable deductions. Further these taxes were an adjustment in purchase price of property—reduced amount of cash taxpayer had to pay for the property. The disallowed tax item is not to be added to cost of property, because it has already been allowed as part of cost.

(b) Taxes (victory tax):

Reported	\$ 0
Corrected	150. 00
Difference	150. 00

15 Hamilton County Intangible (Personal Property) Tax is an allowable deduction in computing victory tax net income.

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SCHEDULE No. 3

Year ended 12-31-43

COMPUTATION OF INCOME AND VICTORY TAX

CURRENT TAX PAYMENT ACT OF 1943

1. Income tax net income, from Schedule No. 2	\$84, 707. 56
2. Less: Personal exemption	\$1, 200. 00
Credit for dependents	700. 00
	<u>1, 900. 00</u>
3. Surtax net income	\$2, 807. 56
4. Less: Earned income credit	1, 400. 00
5. Balance subject to normal tax	\$1, 407. 56
6. Normal tax at 6 percent	4, 884. 45
7. Surtax on item 3	46, 945. 67
8. Total income tax (item 6 plus item 7)	<u>50, 930. 12</u>
11. Victory tax net income	84, 806. 61
12. Less: Specific exemption	624. 00
13. Income subject to victory tax	84, 182. 61
14. Victory tax before credit (5 percent of line 13)	4, 200. 13
15. Less: Victory tax credit	<u>1, 200. 00</u>

COMMISSIONER OF INTERNAL REVENUE VS. HALL C. SMITH 11

16. Net victory tax	3,009.13
17. Net income tax and victory tax	53,939.25
18. Income tax for 1942 per original return	
19. Amount of item 17 or 18 whichever is larger	23,884.81
	53,939.25
16 - 20. Forgiveness feature:	
(a) Amount of item 17 or 18 which is smaller	\$23,884.81
(b) Amount forgiven (three-fourths of (a))	17,913.61
(c) Amount unforgiven	
	5,971.20
21. Total income and victory tax liability	59,910.45
22. Income and victory tax liability disclosed by return	59,488.25
23. Deficiency in income and victory tax	422.20

SCHEDULE No. 4

Year ended 12-31-44

EXPLANATION OF ITEMS

Net income reported (1944)	\$16,104.59
Income tax liability per return	
No changes for year 1944.	4,777.30

In the Tax Court of the United States

Amendment to Petition

Filed September 22, 1947.

Now comes the Petitioner herein and amends the petition here-
tofore filed by attaching a copy of the claim to said petition.

SOL GOODMAN,
1016 Union Trust Building, Cincinnati, Ohio,
Attorney for Petitioner.

Form 843

TREASURY DEPARTMENT
Internal Revenue Service
(Revised April 1940)

CLAIM

To be filed with the Collector where assessment was made or tax paid.

The collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- REFUND OF TAX ILLEGALLY COLLECTED.
- REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.
- ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

Collector's Stamp
(Date received)

STATE OF OHIO,
COUNTY OF HAMILTON } ss:

TYPE
OR
PRINT

Name of taxpayer or purchaser of stamps: Hall C. Smith.

Business address:

Residence: R. R. No. 4, Batavia, Clermont County, Ohio.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Cincinnati, Ohio.
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1943, to Dec. 31, 1943.
3. Character of assessment or tax: Income tax.
- 18 4. Amount of assessment: \$59,488.25; dates of payment: May 18, 1944.
5. Dates stamps were purchased from Government:
6. Amount to be refunded: \$46,864.00.
7. Amount to be abated (not applicable to income or estate taxes):
8. The time within which this claim may be legally filed expires, under Section ____ of the Revenue Act of 1943, on March 15, 1947.

The deponent verily believes that this claim should be allowed for the following reasons:

The deponent paid income tax for the year 1943 in the amount of \$59,488.25, being computed upon salary received from Charles E. Smith & Sons Co. in the year 1942, \$52,000, and the year 1943, \$87,265.08. In cases numbers 9461 and 9462 pending in The Tax Court of the United States, the Commissioner of Internal Revenue contends that a reasonable salary for deponent for the year 1942 was \$25,000 and for the year 1943 was \$30,000. The Commissioner seeks to recover the excess over and above those amounts from deponent as transferee. If it is finally determined that the salaries paid were not reasonable compensation and were received by deponent embraced with a trust in favor of the Government and subject to transferee liability, then deponent is entitled to a refund for income taxes paid on such claimed excessive portion in the amount of the difference of the tax he paid and the tax which would be due amounting to \$12,624.25, entitling deponent to a refund of \$46,864.00.

(Signed) HALL C. SMITH.

Sworn to and subscribed before me this 16th day of January, 1947.

CLARA L. FATH.

19 In the Tax Court of the United States

Answer to petition and to amendment to petition

Filed October 14, 1947

Comes now the Commissioner of Internal Revenue by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition and to the amendment to petition filed herein, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits that the notice of deficiency was mailed to the petitioner on September 4, 1947, but denies that Exhibit "A" attached to the petition is a true copy thereof. Alleges that Exhibit 1 attached hereto is a true copy of said notice of deficiency.

3. Admits that the taxes in controversy are income taxes for the calendar year 1943 in the amount of \$422.20. Denies the remaining allegations contained in paragraph 3 of the petition.

4. Denies that respondent erred in his determination of the deficiency as shown by the notice of deficiency from which petitioner's appeal is taken; specifically denies that in the determina-

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SN:DAR. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after 23 filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEORGE J. SCHÖENEMAN,

Commissioner,

By (S) H. D. EVANS,

Internal Revenue Agent in Charge.

Enclosures:

Statement

Waiver Form 870

STATEMENT

Mr. Hall C. Smith, R.R. No. 4, Batavia, Ohio.

INCOME TAX LIABILITY FOR THE TAXABLE YEAR ENDED

December 31, 1943

Year	Deficiency
1943	\$422.20

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated July 30, 1947, and to your claim for refund for the year 1943, filed January 15, 1947.

If a petition to the Tax Court of the United States is filed against the deficiency proposed herein, the issue set forth in your claim for refund should be made a part of the petition to be considered by the Tax Court in any redetermination of your tax liability. If a petition is not filed, the claim for refund will be disallowed and official notice will be issued by registered mail in accordance with section 3772 of the Internal Revenue Code.

24 ADJUSTMENTS TO INCOME TAX NET INCOME

Year ended December 31, 1943

Income tax net income disclosed by return	\$84,207.90
Unallowable deductions and additional income:	
(a) Taxes on rental property	499.66
Income tax net income adjusted	84,707.56

EXPLANATION OF ADJUSTMENTS TO INCOME TAX NET INCOME

(a) It is held that real estate taxes on your rental property in the amount of \$499.66, which had accrued prior to the date of

purchase of such property, does not constitute an allowable deduction in accordance with the provisions of section 23 of the Internal Revenue Code.

ADJUSTMENTS TO VICTORY TAX NET INCOME

Year ended December 31, 1943

Victory tax net income disclosed by return	\$84,456.95
Unallowable deductions and additional income:	
(a) Taxes on rental property	499.66
Total	84,956.61
Nontaxable income and additional deductions:	
(b) Intangible Tax	150.00
Victory tax net income adjusted	84,806.61

EXPLANATION OF ADJUSTMENTS TO VICTORY TAX NET INCOME

- (a) The real estate taxes accrued prior to the purchase of your rental property do not constitute an allowable deduction, as explained hereinbefore.
- (b) It is held that you are entitled to an additional deduction of \$150.00 for intangible tax on your property, in accordance with the provisions of section 451 (a) of the Internal Revenue Code.

25 COMPUTATION OF INCOME AND VICTORY TAX

Year ended December 31, 1943

1. Income tax net income adjusted	\$84,707.56
2. Less: Personal exemption	\$1,200.00
Credit for dependents	700.00
	1,900.00
3. Balance (surtax net income)	82,807.56
4. Less: Earned income credit	1,400.00
5. Balance subject to normal tax	81,407.56
6. Normal tax at 6% of \$81,407.56	4,884.45
7. Surtax on \$82,807.56	46,045.67
8. Total income tax	50,930.12
9. Victory tax net income adjusted	84,806.61
10. Less: Specific exemption	624.00
11. Income subject to victory tax	84,182.61
12. Tentative victory tax (5% of \$84,182.61)	4,209.13
13. Less: Victory tax credit	1,200.00
14. Net victory tax	3,009.13

18 COMMISSIONER OF INTERNAL REVENUE VS. HALL C. SMITH

15. Net income and victory tax liability	\$53,939.25
16. Income tax for 1942 per return	23,884.81
17. Item 15 or item 16, whichever is larger	53,939.25
18. Forgiveness features:	
(a) Item 15 or item 16, whichever is smaller	\$23,884.81
(b) Amount forgiven, $\frac{3}{4}$ of item (a)	17,913.61
	5,971.20
19. Total income and victory tax liability	59,910.45
20. Income and victory tax liability disclosed by return: Original Account No. 359050	59,488.25
Deficiency	422.20

In the Tax Court of the United States

26

Reply to answer

Filed November 28, 1947

Comes now the petitioner and for reply to the answer herein admits, denies and alleges, as follows:

1. In paragraph 2 of its answer, respondent alleges that Exhibit 1, attached thereto, is a true copy of said notice of deficiency. In paragraph 3 of said answer, respondent denies the allegation contained in paragraph 3 of the petition, wherein petitioner set forth that the deficiency notice included the disallowance of a claim for refund of \$46,864.00. In Exhibit 1, attached to respondent's answer, on the second page thereof, it is shown as follows:

"If a petition to the Tax Court of the United States is filed against the deficiency proposed herein, the issue set forth in your claim for refund should be made a part of the petition to be considered by the Tax Court in any redetermination of your tax liability."

Petitioner therefore alleges that the matter of the denial of the claim for refund is in issue herein.

2. Petitioner denies the allegations contained in paragraph 5 (f) of said answer that the determination holding that he had received \$57,265.08 in excessive salary for the years 1942 and 1943, and that, together with \$30,000 paid by the corporation to the petitioner in redemption of its stock, it resulted in petitioner becoming liable as transferee to the extent of \$87,265.08. Petitioner states, however, that on October 27, 1947, the Tax Court revised its prior opinion and held that petitioner's liability was limited to \$57,265.08.

3. For further reply, petitioner specifically denies each and every allegation contained in the answer of respondent, excepting

only such allegations which contain facts that were set forth in the petition and in this reply.

Wherefore, petitioner prays the Court for relief as in his petition.

SOL GOODMAN,

1016 Union Trust Building, Cincinnati, Ohio,

Attorney for Petitioner.

27 Duly sworn to by Hall C. Smith jurat omitted in printing.

In the Tax Court of the United States

Stipulation of facts

Filed at hearing March 1, 1948

It is hereby stipulated and agreed by and between counsel for the respective parties that the facts hereinafter stated are true and correct and that this stipulation may be offered in evidence in the trial of this cause by either party with the same force and effect as if the same were duly proved by the testimony of witnesses, reserving to each party the right to offer any additional testimony on any or all of the matters covered in this stipulation not inconsistent with any of the facts stated herein, in accordance with the rules of The Tax Court of the United States.

1. The petitioner, Hall C. Smith, is an individual residing in Batavia, Ohio. During the fiscal years ended July 31, 1942 and July 31, 1943 petitioner was the president and sole owner of the corporate stock of The Charles E. Smith & Sons Company,
28 (hereinafter referred to as the company), a corporation organized under the laws of the State of Ohio, and doing business in Cincinnati, Ohio.

2. In March of 1943 petitioner purchased two parcels of real property in Cincinnati, Ohio, and as part of said purchase agreed to and did pay to the State of Ohio the amount of \$499.66 in satisfaction of liens for taxes for the calendar year 1942, which, under the provisions of section 5671 of the Ohio Code, attached to said property on the day preceding the second Monday of April 1942. The disallowance by respondent of this payment as a deduction from petitioner's 1943 gross income in determining taxable income for said year is the sole adjustment producing the deficiency here in controversy.

3. The company paid petitioner a salary of \$52,000 for his services during the fiscal year ended July 31, 1942. All of this salary was paid during the period commencing August 1, 1941 and ending September 15, 1942. The company paid petitioner a salary of \$87,265.08 for his services during the fiscal year ended

July 31, 1943. All of this salary was paid during the period beginning August 1, 1942, and ending September 1, 1943.

4. The company deducted the amounts of salary referred to in paragraph 3, supra, from income in its Federal income and declared value excess-profits tax returns filed for the fiscal years ended July 31, 1942 and July 31, 1943, respectively. The Commissioner of Internal Revenue determined that said amounts of salary exceeded a reasonable allowance for compensation for services actually rendered by petitioner to the company, to the extent of \$27,000 for the 1942 and \$57,265.08 for 1943, and, further, that to the extent thereof petitioner was liable as transferee, under the provisions of section 311 of the Internal Revenue Code, for the companies deficiencies in Federal income, declared value excess-profits and excess profits taxes for the fiscal years ended July 31, 1942 and July 31, 1943.

5. The said company and the petitioner each filed petitions with the Tax Court of the United States for redetermination 29 of the proposed deficiencies resulting from the aforesaid adjustments by the Commissioner of Internal Revenue as set forth in paragraph 4, supra, and on May 12, 1947, the Tax Court promulgated its consolidated opinion, which was modified by order of the Tax Court entered October 28, 1947, wherein the action of the Commissioner in disallowing the aforesaid portions of salaries paid to Hall C. Smith as excessive compensation was sustained in its entirety, and in the case of Hall C. Smith the Court held that he was liable as transferee of the said Charles E. Smith & Sons Company for the aforesaid years ending July 31, 1942 and July 31, 1943, to the extent of \$57,265.08. Rule 50 recomputations in both proceedings have been prepared and filed with the Tax Court. However, the Court has not as yet entered its final order in either proceeding. No part of the aforesaid amount of \$57,265.08 has as yet been paid by petitioner, Hall C. Smith, as transferee of the said company.

6. The petitioner included the salaries referred to in paragraph 3, supra, in his income tax returns filed for the calendar years 1942 and 1943. The tax liability disclosed by said returns to be due for the calendar year 1943 was paid by petitioner at various times, through withholding by the company, payment on 1942 income, payments on account of Declaration of Estimated Tax, and the balance on or about the date of filing of his 1943 return.

7. The petitioner received the salaries referred to in paragraph 3, supra, under a claim of right and has ever since retained said amount of salaries, and had no knowledge of the proposed disallowance of said salaries as a deduction to said company until September of 1944.

8.. On January 15, 1947, petitioner filed with the Collector of Internal Revenue at Cincinnati, Ohio, a claim for refund of a portion of the income tax paid on the salaries referred to in paragraphs 3 and 6, *supra*. A copy of said claim is attached to the petition. This claim was denied by the Commissioner of Internal Revenue in the notice of deficiency referred to in paragraph 9 herein.

9. The notice of deficiency attached to respondent's answer in this proceeding, as Exhibit 1, is a true and correct copy of the notice of deficiency upon which this petition is based.

*SOL GOODMAN,
Counsel for Petitioner.
(Sgd.) CHARLES OLIPHANT, WWK
Chief Counsel,
Bureau of Internal Revenue, Counsel for Respondent.*

In the Tax Court of the United States

11 T. C. No. 25

HALL C. SMITH, PETITIONER, v. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 15836. Promulgated August 16, 1948

In a prior proceeding in this Court the petitioner was held liable, in equity, as a transferee for unpaid taxes of a corporation of which he was sole stockholder and president, to the extent of the salary paid to him in 1943, when the corporation was insolvent, in excess of reasonable compensation for services rendered. Held, that such excessive salary was received by the petitioner in trust for the benefit of the corporation's creditors and is therefore not taxable to the petitioner in his individual income tax return.

Sol Goodman, Esq., for the petitioner.

John O. Durkan, Esq., for the respondent.

31

Opinion

LEMIRE, Judge: The respondent has determined a deficiency in petitioner's income tax for 1943 in the amount of \$422.20. The petitioner claims an overpayment of \$46,864 in his tax for that year. The deficiency results from the disallowance of the deduction of real estate taxes which had accrued prior to the date of petitioner's purchase of property. The claim for refund, which has been disallowed in full by the respondent, involves the petitioner's liability for tax on a portion of the compensation paid to him in the taxable year by a corporation of which he was presi-

dent and sole stockholder. The respondent determined, and was sustained by this Court, that a portion of such compensation was excessive and that to the extent of such excess the petitioner was liable as transferee for the unpaid taxes due from the corporation.

The parties have submitted a stipulation of facts which we adopt as our findings of fact herein. These facts may be summarized as follows:

The petitioner is a resident of Batavia, Ohio. He filed his return for the taxable year involved with the collector of internal revenue for the southern district of Ohio. During 1942 and 1943 the petitioner was the president and sole stockholder of The Charles E. Smith & Sons Company. The company paid him a salary of \$52,000 for its fiscal year ended July 1, 1942, and \$87,265.08 for the year ended July 31, 1943. The 1942 salary was all paid to the petitioner over the period August 1, 1941, to September 15, 1942, and that for 1943 over the period August 1, 1942, to September 1, 1943.

The salary so paid to the petitioner was deducted by the company in its income and declared value excess-profits tax returns for the respective years but the respondent determined that it exceeded a reasonable compensation for the services rendered by the petitioner to the extent of \$27,000 in 1942 and \$57,265.08 in 1943. The respondent further determined that to the extent of such excessive salary the petitioner was liable as transferee for the unpaid taxes of the company.

32 The company and the petitioner each filed a petition to this Court. In the action brought by the company, Docket No. 9461, we sustained the Commissioner's disallowance of a portion of the petitioner's salary for both 1942 and 1943, and in the transferee proceeding, Hall C. Smith, Transferee, Docket No. 9462, we found the petitioner not liable in respect of the compensation paid to him for 1942, since there was no proof that the company was insolvent when the salary for that year was paid, but liable in respect of the excessive 1943 salary to the full extent thereof for the payment of company taxes for 1942 and 1943. Decisions in both proceedings were entered May 28, 1948.

The petitioner reported all of the salary paid to him by the company in 1942 and 1943 and paid the tax shown to be due thereon. On January 15, 1947, the petitioner filed with the collector of internal revenue at Cincinnati, Ohio, a claim for refund of \$46,864 of the \$59,488~~.25~~ tax which he had paid on his 1943 return. The claim was based on the petitioner's contention that he may not be taxed on the excessive salary which might be subject to transferee liability as finally determined. The claim for refund was disallowed by the respondent in the notice of deficiency herein.

It is stipulated that—

The petitioner received the salaries referred to in paragraph 3, supra, under a claim of right and has ever since retained said amount of salaries, and had no knowledge of the proposed disallowance of said salaries as a deduction to said company until September of 1944.

In March 1943 the petitioner purchased two parcels of real property located in Cincinnati, Ohio, and as a part of the purchase price thereof agreed to pay and did pay to the State of Ohio the amount of \$499.66 in satisfaction of liens for taxes for the calendar year 1942. Under the provisions of section 5671 of the Ohio Code the liens had attached to the property on the day preceding the second Monday in April 1942. The amount of taxes
33 so paid was claimed as a deduction by the petitioner in his 1943 return and was disallowed by the respondent in determining the deficiency.

The transferee liability with which section 311 (a) of the Internal Revenue Code deals is liability either "at law or in equity." Liability at law is commonly based upon the contractual obligation, as where one corporation acquires the assets of another and agrees to pay the taxes of the transferor. Liability in equity is said to rest upon the trust fund doctrine; that is, the transferee receives assets from the transferor impressed with a trust for the benefit of the transferor's creditors. See *Pierce v. United States*, 255 U. S. 398; *Phillips v. Commissioner*, 283 U. S. 589; *Phillips-Jones Corporation v. Parhley*, 302 U. S. 233. In the last cited case the Court said:

The liability of the stockholders for the taxes was not created by section 280. It does not originate in an assessment made thereunder. Long before the enactment it had been settled under the trust fund doctrine (see *Pierce v. United States*, 255 U. S. 398, 402, 403 * * *) that if the assets of a corporation are distributed among the stockholders before all its debts are paid, each stockholder is liable severally to creditors, to the extent of the amount received by him; and that as between all stockholders similarly situated the burden of paying the debts shall be borne ratably. * * *

The petitioner's transferee liability for the 1942 and 1943 taxes of the Charles E. Smith & Sons Company, as determined by this Court in the proceeding referred to above, Docket No. 9462, was found to have resulted from the distributions made to him by the company in the year 1943, when the company was insolvent, in excess of reasonable compensation for services rendered. Thus, the transferee liability was a liability in equity resulting from the distributions to him of assets of the insolvent transferor without adequate consideration. The correctness of the

9
24 COMMISSIONER OF INTERNAL REVENUE VS. HALL C. SMITH

34 Tax Court's determination in the transferee proceeding is not attacked in this proceeding. The petitioner's only contention here is that since it has been determined by this Court that he is liable in equity as a transferee for the unpaid taxes of the transferor, to the extent of the full amount of excessive compensation distributed to him in the taxable year, such excessive salary may not be included in his taxable income.

We think that the petitioner must be sustained in this contention. The determination of this Court that the petitioner is liable in equity, as transferee, can mean only that he received the transferor's assets (the excessive compensation) impressed with a trust in favor of the Government's claim against the transferor for unpaid taxes. The petitioner held the funds not for himself but for the creditors of the transferor.

Since Eisner v. Macomber, 252 U. S. 189, the "use and benefit" theory has been accepted as a guiding principle in determining income tax liability. It has become almost axiomatic in our tax law that individual tax liability results only from the receipt of income, in money or the equivalent, for the taxpayer's beneficial use.

In Commissioner v. Wilcox, 327 U. S. 404, the Supreme Court said that "a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain." The Court further said that "the bare receipt of property or money wholly belonging to another lacks the essential characteristics of a gain or profit within the meaning of Section 22 (a)."

It was said in Corliss v. Bowers, 281 U. S. 376, that "The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income."

Funds received in trust for the use and benefit of others are not income to the recipient. In Parkview Memorial Association, 34 B. T. A. 406, we said, speaking of amounts set aside for maintenance of a cemetery association, "If, however, there is a trust which the law recognizes, whether express or implied, and a prescribed part of the contract price received for a lot can be said to be received in trust, such part is excluded from gross income." See also Portland Cremation Association v. Commissioner, 31 Fed. (2d) 843. The funds received by lessor as bonus money for an oil lease, which the lessor was legally obligated to pay over to the State of Texas, were held not taxable to the lessor in Commissioner v. Turney, 82 Fed. (2d) 661. The court there said: "Tax officials are not required to treat as income money received by a taxpayer when, under well-settled law, his receipt of

it has the effect of obligating him unconditionally to pay that money to another."

Park & Tilford, 43 B. T. A. 348, involved a situation somewhat analogous to that in the instant case. There the assets of two liquidating corporations designated A and B were distributed to two other corporate shareholders, Y and Z, which in turn liquidated and distributed their assets to the stockholders. We held that the unpaid taxes for corporations A and B, for which Y and Z were liable, should be taken into account in determining the transferee liability of the stockholders of Y and Z.

The instant case is distinguishable from cases like North American Oil Consolidated v. Burnet, 286 U. S. 417, dealing with the receipt of income "under a claim of right and without restriction as to its disposition." Here, there was a definite legal restriction of the petitioner's use of the excessive compensation which attached the moment that he received it. Such is the nature of a transferee liability.

There is obvious inconsistency, as well as injustice, in the respondent's position in seeking to tax the petitioner on income to which he, the respondent, has successfully laid claim on the ground that it was never the petitioner's income by right.

The petitioner's contention with respect to the deduction of real estate taxes paid in 1943 as a part of the purchase price of the property is rejected on authority of Pyramid Metals Co., 44 B. T. A. 1087, and cases therein cited.

Decision will be entered under Rule 50.

36

In the Tax Court of the United States

Decision

Entered October 26, 1948

Pursuant to the Court's Opinion, promulgated August 16, 1948, both parties filed computations which came on for hearing on September 29, 1948. Due consideration having been given thereto, it is

Decided that there is an overpayment of \$32,857.36 in income and victory tax for 1943, which overpayment was made within the limitations prescribed by section 322 (d) of the Internal Revenue Code.

Enter:

(SEAL)

(S) C. P. LEMIRE, Judge.

In the Tax Court of the United States

Petition for review

Filed January 19, 1949

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Sixth Circuit to review the decision entered by The Tax Court of the United States on October 26, 1948, deciding that "there is an overpayment of \$32,857.36 in income and victory tax for 1943, which overpayment was made within the limitations prescribed by section 322 (d) of the Internal Revenue Code." The respondent on review, Hall C. Smith, filed his individual income tax return for the calendar year 1942 and his individual income and victory tax return for the calendar year 1943 with the Collector of Internal Revenue for the First District of Ohio, whose office is located at Cincinnati, Ohio, and within the judicial circuit of the United States Court of Appeals for the Sixth Circuit, wherein this review is sought. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code. This
37 controversy involves Federal income and victory tax for the calendar year 1943.

(S) THERON L. CAUDLE, CAR

Assistant Attorney General,

(Signed) CHARLES OLIPHANT, CAR

*Chief Counsel, Bureau of Internal Revenue, Attorneys
for Petitioner on Review.*

In the Tax Court of the United States

Notice of filing petition for review

Filed February 1, 1949

To SOL GOODMAN, Esq.,

*1016 Union Trust Building,
Cincinnati 2, Ohio.*

You are hereby notified that the Commissioner of Internal Revenue did, on the 19th day of January, 1949, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Sixth Circuit of the decision of this Court heretofore rendered in the above-entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 25th day of January, 1949.

VICTOR S. MERSCH,
Clerk, The Tax Court of the United States.

Service of copy of petition for review acknowledge this 29th day of January, 1949.

(S) SOL GOODMAN,
Counsel for Respondent on Review.

38

In the Tax Court of the United States

Notice of filing petition for review

Filed February 1, 1949

To Mr. HALL C. SMITH,
R. R. No. 4, Batavia, Ohio.

You are hereby notified that the Commissioner of Internal Revenue did, on the 19th day of January, 1949, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Sixth Circuit of the decision of the Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 25th day of January, 1949.

(Signed) CHARLES OLIPHANT, AHF
Chief Counsel, Bureau of Internal Revenue,
Counsel for Petitioner on Review.

Service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 27th day of January, 1949.

(S) HALL C. SMITH,
Respondent on Review.

39

In the Tax Court of the United States

Statement of points

Filed August 4, 1949

Comes now the petitioner on review herein and makes this concise statement of points on which he intends to rely on the review herein, to-wit:

The Tax Court of the United States erred:

1. In holding that excessive compensation received by the taxpayer in the amount of \$57,265.08 may not be included in his taxable income.
2. In failing to uphold the action of the Commissioner in including in taxable income the excessive compensation received by the taxpayer in the amount of \$57,265.08.
3. In holding that there is an overpayment of \$32,857.36 in income and victory tax for 1943.

28 COMMISSIONER OF INTERNAL REVENUE VS. HALL C. SMITH

4. In failing to hold that there is a deficiency in income tax for the year 1943 in the amount of \$422.20.
5. In that its decision is contrary to law and regulations and is not supported by substantial evidence.

(S) THERON L. CAUDLE, CAR

Assistant Attorney General,

(Signed) CHARLES OLIPHANT, CAR

Chief Counsel, Bureau of Internal Revenue, Counsel for Petitioner on Review.

Service of a copy of the within statement of points is hereby admitted this 2nd day of August, 1949.

(S) SOL GOODMAN,

1016 Union Trust Building, Cincinnati 2, Ohio,

Counsel for Respondent on Review.

40 Designation of contents of record on review (omitted in printing)

41 Clerk's Certificate to foregoing transcript omitted in printing.

In the Tax Court of the United States

Order enlarging time re record, February 18, 1949

Upon motion of counsel for the petitioner, it is

Ordered that the time for preparation, transmission and delivery of the record ~~for~~ petition for review of the above-entitled proceeding in the United States Court of Appeals for the Sixth Circuit is extended to April 19, 1949.

(Signed) BOLON B. TURNER,

Presiding Judge.

Dated: Washington, D. C., February 18, 1949.

A true copy.

Attest:

[SEAL]

VICTOR S. MERSCH,

Clerk,

The Tax Court of the United States.

COMMISSIONER OF INTERNAL REVENUE VS. HALL C. SMITH 29

42 In United States Court of Appeals, Sixth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW,
v.

HALL C. SMITH, RESPONDENT ON REVIEW.

Order enlarging time re record

(Filed April 13, 1949)

Before: Hicks, Allen, and Miller, JJ.

For cause shown, it is ordered that the time within which to file the record on review in the above-entitled cause with this Court be, and the same is, extended to and including June 19, 1949.

It is further ordered, that the Clerk of this Court is directed to transmit to the Clerk of The Tax Court of the United States a certified copy of this order.

(S) XEN HICKS,
Chief Judge.

A true Copy.

Attest:

J. W. MENZIES,
*Clerk, U. S. Court of Appeals
for the Sixth Circuit.*
By (S) MARY M. McAFFEE,
Deputy Clerk.

43

In United States Court of Appeals

Order enlarging time re record

(Filed June 27, 1949)

For cause shown, it is ordered that the time within which to file the record on review in the above-entitled cause with this Court be, and the same is, extended to and including August 19, 1949.

It is further ordered, that the Clerk of this Court is directed to transmit to the Clerk of The Tax Court of the United States a certified copy of this order.

Done at Cincinnati, Ohio, this 21st day of June A. D. 1949,

(S) XEN HICKS,
U. S. Circuit Judge.

A true Copy.

Attest:

J. W. MENZIES,
*Clerk, U. S. Court of Appeals
for the Sixth Circuit.*
By (S) MARY M. McAFFEE,
Deputy Clerk.

[SEAL]

**PROCEEDINGS IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Cause Argued and Submitted

(Feb. 5, 1952—Before: Allen, Martin & McAllister, JJ.)

This cause is argued by Graham Loving, Jr. for petitioner and Sol Goodman for respondent and is submitted to the court.

Judgment

(Filed: Feb. 12, 1952)

This case came on to be heard on the record and briefs and oral argument of counsel.

And it appearing that the Tax Court of the United States, in a prior proceedings, held the respondent liable in equity as a transferee for unpaid taxes of a corporation, and that the decision of the Tax Court was affirmed by this court in Smith v. Commissioner, 184 Fed. (2nd) 1011, cert. denied, 340 U.S. 953;

And it appearing that the receipt of the excessive salary to the extent of which the respondent was held liable as transferee constituted "the bare receipt of property or money wholly belonging to another," Commissioner v. Wilcox, 327 U.S. 404, and that the respondent held the funds not for himself but for the creditors of the transferor;

It is ordered that the decision of the Tax Court be, and it hereby is, affirmed.

Petition for Rehearing

(Filed: March 1, 1952)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 10979

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

HALL C. SMITH, RESPONDENT

*On Petition for Review of the Decision of the Tax Court of the
United States***Petition of the Petitioner for Rehearing**

On February 12, 1952, this Court, relying upon the decision of the Supreme Court in the case of *Commissioner v. Wilcox*, 327 U. S. 404, affirmed *per curiam*, the decision of the Tax Court in this case. The Tax Court had held that salaries paid to the taxpayer in 1943, which were later determined to be excessive and therefore to the extent of which the taxpayer was liable as transferee for the taxes of his employer by reason of the employer's insolvency, were not income in 1943.

Since the date of this Court's decision in this case, the Court of Appeals for the Second Circuit on February 15, 1952; held in the cases of *Commissioner v. Hartfield* and *Commissioner v. Healy*, which presented the identical issue presented in the instant case, that the excessive salaries to the full amount received were income in the year of receipt thus reversing the Tax Court on the question involved.

In addition, at this time the Supreme Court is considering the case of *United States v. Rutkin*, 189 F.2d 431 (C.A. 3d), in which

appeal the Wilcox decision is directly involved. This case was argued during the week of December 3, 1951, and decision is expected shortly.

In view of this situation, and in order, if possible, to avoid the costly and perhaps unnecessary procedure of presenting this case to the Supreme Court by reason of the present conflict between this Court and the Court of Appeals of the Second Circuit, the petitioner on appeal respectfully petitions this Court for rehearing as to its decision in this matter.

This petition is presented in good faith and not for delay.

Respectfully submitted,

ELLIS N. SLACK,
Acting Assistant Attorney General.

A. F. PRESCOTT,
GRAHAM LOVING, JR.,
Special Assistants to the Attorney General.

FEBRUARY, 1952

Order Denying Petition for Rehearing

(Filed: April 11, 1952)

The petition for rehearing is denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

I, CARL W. REUSS, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of

COMMISSIONER OF INTERNAL REVENUE

vs.

HALL C. SMITH

No. 10,979, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 19th day of May, A. D. 1952.

CARL W. REUSS,
*Clerk of the United States Court of Appeals
for the Sixth Circuit.*

SEAL

49

Supreme Court of the United States

No. 138, October Term, 1952

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

HALL C. SMITH

Order allowing certiorari

(Filed October 13, 1952)

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 76, Healy et al. vs. Commissioner of Internal Revenue.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.